No. 7765

United States Circuit Court of Appeals

For the Ninth Circuit

MARGARET B. BARRINGER and PHOENIX TITLE and TRUST COMPANY, as Trustee,

Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, CENTRAL ARIZONA LIGHT and POWER COMPANY, a corporation, COUNTY OF MARICOPA, a political subdivision of the State of Arizona, STATE OF ARIZONA, JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona, MITT SIMS, Treasurer of the State of Arizona, W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,

Appellees.

Appellants' Reply to Appellee's Supplemental Brief.

WM. H. MACKAY,
Solicitor for Margaret B. Barringer and Phoenix Title and Trust Company.

ELLINWOOD & ROSS,
KIBBEY, BENNETT, GUST,
SMITH & ROSENFELD,
Of Counsel.

Subject Index

	Page
The Case Presents a Controversy Under 24 (a)	1
Pleadings and issues	1
Decree did not adjudicate any claim	2
Controversy as to trust company conceded	2
Trustees' theory as to Barringer	2
Lien secured Tunney's debt, not bankrupt's	3
Even regarding Barringer as a creditor, still a controversy—no dispute as to debt	3
The problem viewed from 25 (a)	4
Trustee's authorities	4
Conclusion	5
Review under 24 (b)	6
Under Any Theory the Deed to Trust Company Was Properly Recorded as a Deed	6
Owens, et al., had no interest	6
Trustee's contentions re recording, minor premises based on false assumption	7
Deed absolute as security properly recorded as deed	7
Conclusion	10
Appendix	12
Decisions cited by appellee involving simple trust deeds given by owner to secure debt and for no other purpose	12
Decisions cited by appellee involving conveyance by owner to third party to secure debt	12
Decisions cited by appellee involving subdivision trusts	12

Table of Authorities Cited

Cases	Pages
Bank of Wadesboro v. Little (4 C. C. A. 1934) 71 Fed. (2d) 513	4
Cady v. Purser (1901) 131 Cal. 552, 63 Pac. 844	8
Central Pacific Ry. Co. v. Droge (1915) 171 Cal. 32, 151 Pac. 664	8
Coder v. Arts (1909) 213 U. S. 223, 227, 53 L. Ed. 772, 775	4
David v. Roe (Tex. Civ. App. 1925) 271 S. W. 196, 199	8
Doughery v. Bettencourt (1931) 214 Cal. 455, 6 Pac. (2d) 499	7
Earl v. Sunnyside Land Co. (1907) 150 Cal. 214, 88 Pac. 920	14
Gaudette v. Graham (9 C. C. A. 1908) 164 Fed. 311, 314	4
Griffin v. Lenhart (4 C. C. A. 1920) 266 Fed. 675, 676	4
Hutchinson v. Otis Wilcox & Co. (1903) 190 U. S. 552, 553, 556, 47 L. Ed. 1179, 1181, 1182	4, 5
In re Columbia Real Estate Co. (7 C. C. A. 1902) 112 Fed. 643, 647	3
In re Harris (9 C. C. A. 1935) 78 Fed. (2d) 849	6
In re Loving (1911) 224 U. S. 183, 187, 56 L. Ed. 725, 726	5
In re Thompson (9 C. C. A. 1915) 264 Fed. 913, 917	4
Kenard v. Mabry (1890) 78 Tex. 151, 14 S. W. 272	8, 9
Kent v. Williams (1905) 146 Cal. 3, 10, 79 Pac. 527, 530	8, 9
Moody & Sons v. Savings Bank (1915) 239 U. S. 374, 375-377, 60 L. Ed. 336, 339, 340	4, 5

Page

More v. Calkins (1890) 85 Cal. 177, 24 Pac. 729.. 12

Sacramento Bank v. Alcorn (1898) 121 Cal. 379, 53 Pac. 813 12

San Diego Construction Co. v. Mannix (1917) 174 Cal. 548, 559, 166 Pac. 325..... 13

Stephen v. Patterson (1920) 21 Ariz. 308, 188 Pac. 131 7

Tefft, Weller & Co. v. Munsuri (1911) 222 U. S. 114, 115, 116, 56 L. Ed. 118, 119..... 5

Wilson v. McLaughlin (1937) 89 Cal. App. 485, 67 Pac. (2d) 710..... 12

Withers v. Bousefield (1919), 42 Cal. App. 304, 312, 183 Pac. 855, 859..... 13

Younger v. Moore (1907) 155 Cal. 767, 771, 103 Pac. 221, 223 12

Statutes

Complete Texas Statutes 1928:
Art. 6601 8

Revised Code Arizona 1928:
Sec. 854 8

Revised Statutes Arizona 1901:
Sec. 6601 8

Texas Revised Statutes:
Art. 4334 8

United States Statutes:
Bankruptcy Act:
Sec. 24(a) 1
Sec. 24(b) 6
Sec. 25(a) 4

Vernon Sales Texas Statutes:
Art. 6796 8

No. 7765

United States Circuit Court of Appeals

For the Ninth Circuit

MARGARET B. BARRINGER and PHOENIX TITLE and TRUST COMPANY, as Trustee,

Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, CENTRAL ARIZONA LIGHT and POWER COMPANY, a corporation, COUNTY OF MARICOPA, a political subdivision of the State of Arizona, STATE OF ARIZONA, JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona, MITT SIMS, Treasurer of the State of Arizona, W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,

Appellees.

Appellants' Reply to Appellee's Supplemental Brief.

THE CASE PRESENTS A CONTROVERSY UNDER 24 (a).

Pleadings and issues.

In the petition to marshall liens trustee urged that Barringer claimed a lien under a declaration of trust executed by Trust Company and Tunney (Tr. 170, 171) and that "all the bankrupt's debts were contracted subsequent to the execution of said 'Declaration of Trust' " (Tr. 171). Barringer intervened and

answered, setting up Tunney's debt and the declaration of trust, in no way imputing any indebtedness to the bankrupt (Tr. 189-197). In its answer Trust Company pleaded ownership and its right to hold title in accordance with the terms of the trust (Tr. 323-337).

Decree did not adjudicate any claim.

The order, responsive to the pleadings, was silent as to allowance or disallowance of any claim (Tr. 414; 231-253). It adjudged that Trust Company and Barringer had no interest, by way of lien or otherwise (Tr. 239).

Controversy as to trust company conceded.

Manifestly, there was a controversy between Trust Company and the bankrupt's trustee, who makes no contention to the contrary. But, trustee contends the issues between Barringer and trustee constitute a proceeding. If this were true, the evidence would be reviewable, none the less, under the controversy between trustee and Trust Company, which in its answer asserted its duty to hold title for the purposes specified in the declaration of trust.

Trustees' theory as to Barringer.

Prior to the filing of the petition to marshall liens, Barringer filed a "Proof and Claim of Lien" in which she set up Tunney's note and her rights under the declaration of trust (Tr. 577-583). Subsequently, at a creditor's meeting on June 18, 1931, trustee requested the referee to sell free and clear (Tr. 184). In his order of that date the referee recited that no

objections to such sale were made (Tr. 184-185). Barringer, however, appeared and orally objected to such sale (Tr. 484-485), the substance of her objections being set forth in Trustee's Exhibit F (Tr. 585-586). This instrument was never filed (Tr. 586). In any event, by clear reference to the "Proof and Claim of Lien" hereinabove mentioned, she again asserted her right to the lien for *Tunney's* debt and, even filed, it would have been but a petition in intervention.

Lien secured Tunney's debt, not bankrupt's.

Regardless of whether the litigation be deemed arising under trustee's petition to marshall liens, Barringer's "Proof and Claim of Lien" or her *unfiled* "Petition in Intervention and Objections to Sale", the indebtedness by her uniformly asserted as the basis of her lien was precisely stated as *Tunney's*. A dispute over a lien securing a third person's debt is a controversy, whether or not the debt be disputed.

In re Columbia Real Estate Co. (7 C.C.A. 1902) 112 Fed. 643, 647.

Even regarding Barringer as a creditor, still a controversy,— no dispute as to debt.

If Barringer's assertion of Tunney's debt constitutes filing a claim against the bankrupt, it appears the debt was not disputed in the pleadings or otherwise. Not only did the District Court affirm the referee's finding that Tunney owed Barringer the full amount claimed by her (Tr. 247) but trustee's counsel offered to allow the full amount as an unsecured claim (Tr. 678). Hence, even under trustee's theory, there

was a controversy as to the lien because the debt was, from start to finish, undisputed.

Gaudette v. Graham (9 C.C.A. 1908) 164 Fed. 311, 314;

Moody & Sons v. Savings Bank (1915) 239 U.S. 374, 375-377; 60 L. Ed. 336, 339, 340;

Griffin v. Lenhart (4 C.C.A. 1920) 266 Fed. 675, 676;

Bank of Wadesboro v. Little (4 C.C.A. 1934) 71 Fed. (2d) 513.

The problem viewed from 25(a).

The last conclusion is strengthened by viewing Barringer's remedy under 25 (a). Although the debt exceeded five hundred dollars, she could not appeal under that section because the order "was not a judgment allowing or rejecting a debt or claim of five hundred dollars or over".

Gaudette v. Graham (9 C.C.A. 1908) 164 Fed. 311;

Hutchinson v. Otis Wilcox & Co. (1903) 190 U.S. 552, 553, 556; 47 L. Ed. 1179, 1181, 1182;

In re Thompson (9 C.C.A. 1915) 264 Fed. 913, 917.

In the case last cited this Court declared:

> "The real *gist* of the controversy in all of these proceedings was respecting the *allowance* or *disallowance* of a claim, and the final word of the referee was to disallow it" (italics ours).

Trustee's authorities.

In *Coder v. Arts* (1909) 213 U.S. 223, 227; 53 L. Ed. 772, 775, the trustee filed objections not only to

the mortgages but to the notes secured thereby. In *In re Loving* (1911) 224 U.S. 183, 187; 56 L. Ed. 725, 726, the trustee contested the debt as well as the lien. After adjudication the trustee abandoned objections to the debt. Quite reasonably this was held not to alter the character of proceedings had before such abandonment. In *Hutchinson v. Otis Wilcox & Co.* (1903) 190 U.S. 552, 553; 47 L. Ed. 1179, 1181, the company filed a claim under a judgment secured by an attachment. The trustee objected to allowance of the claim, asserting that the judgment had been satisfied. Thus, in all these decisions the trustee disputed allowance of the claim.

In *Tefft, Weller & Co. v. Munsuri* (1911) 222 U.S. 114, 115, 116; 56 L. Ed. 118, 119, the company filed a claim which was *allowed.* Munsuri moved to vacate the allowance and his motion was, on review to the District Court, granted. Here the contest plainly was as to allowance of a claim.

Conclusion.

The dispute as to Barringer, as well as to Trust Company, had "every attribute of a suit in equity for the marshalling of assets, the sale of encumbered property, and the application of the proceeds to the liens in the order and mode ultimately fixed by the decree. True, it was begun by the trustees, and not by an adverse claimant, but this is immaterial * * *."

Moody & Sons v. Savings Bank (1915) 239 U.S. 374, 377; 60 L. Ed. 336, 340.

Neither the pleadings nor the decree concern themselves with the existence or the amount of *any* debt. The sole dispute was as to the lien. Appellants are entitled to a review of the evidence.

Review under 24 (b).

There is no conflict in the testimony. Whether there is *any* substantial evidence to support the findings that appellants sold to Owens, et al., and held them and the bankrupt out as owners raises a question of law under 24 (b).

In re Harris (9 C.C.A. 1935) 78 Fed. (2) 849.

II. UNDER ANY THEORY THE DEED TO TRUST COMPANY WAS PROPERLY RECORDED AS A DEED.

Owens, et al., had no interest.

In trustee's opening brief it was contended that Barringer's deed to Trust Company vested equitable title in Owens, Dinmore and Mills. Conflicting explanations of this phenomenon were offered: (a) the terms of the trust agreement, (b) the doctrine of resulting trusts. In appellants' earlier briefs it was demonstrated that Tunney stipulated he should have no interest in the land (Tr. 443-444) and that Owens, Dinmore and Mills on taking the assignment stipulated title was in Trust Company (Tr. 510, 512). These stipulations, as did the very purpose of the trust, required Trust Company to have complete title to enable it to sell and convey lots (Opening Brief 15-17; Reply Brief 2-4).

Trustee's contentions re recording, minor premises based on false assumption.

Appellee's supplemental brief is confined to premises based on the assumption that Owens, Dinmore and Mills had title, namely: (a) that Barringer's deed to Trust Company was equivalent to a mortgage from Owens *et al.,* and (b) was void because recorded as a deed rather than a mortgage. Even were these two minor premises sound, they would be meaningless because Owens *et al.* had no title, equitable or otherwise. It should, therefore, be unnecessary to consider them. It may be noted, however, that the minor premises, viewed independently, are unsound propositions of law.

Deed absolute as security properly recorded as deed.

To most squarely view appellee's contention that Barringer's deed was void because not recorded as a mortgage, it will be *assumed* that Owens *et al.* owned the property and, to secure Tunney's note, conveyed to Trust Company by deed recorded as such.

Undoubtedly, to impart notice, an instrument must be recorded in the proper book. Under proposition III in appellee's supplemental brief authorities, chiefly from California, are cited to this effect. But, in none of them was it hinted that a deed absolute should be recorded as a mortgage. They, severally, involved the recording of an express agreement to give a lien (*Stephen v. Patterson*), a tax certificate not copied by the recorder in *any* book (*Doughery v. Bettencourt*), a *realty mortgage* recorded as a *bill of sale*

(*Cady v. Purser*), and a *deed* recorded in the book of *miscellaneous* instruments (*Central Pacific Ry. Co. v. Droge*).

The cases *in point* hold that absolute deeds intended as security are *properly* recorded as *deeds*. Not only is this the California rule but it is the rule in Texas, whence came the Arizona Recording Act (Opening Brief 23) and the very statute relied upon by opposing counsel as requiring such deeds to be recorded as mortgages.

Kenard v. Mabry (1890) 78 Tex. 151, 14 S.W. 272.

See:

David v. Roe (Tex. Civ. App. 1925) 271 S.W. 196, 199;

Kent v. Williams (1905) 146 Cal. 3, 10; 79 Pac. 527, 530.

Section 6601 Revised Statutes Arizona 1901 was copied *verbatim* from Article 4334 Texas Revised Statutes (Article 6601 Complete Texas Statutes 1928; Article 6796 Vernon Sales Statutes), each of which reads as follows:

> "All deeds of trust, mortgages, *and judgments which are required to be recorded in order to create a judgment lien,* or other instruments of writing intended to create a lien, shall be recorded in a book separate from those in which deeds or other conveyances are recorded."

In the present statute (section 854 Revised Code Arizona 1928) the above italicized clause (relating to

judgments) has been deleted. Otherwise it, like the earlier enactment, is the Texas statute, *verbatim*.

Construing this counterpart of the Arizona statute the Texas Court in *Kenard v. Mabry, supra,* pointed out that any one relying upon recorded title would not content himself to look alone for liens,—that everyone knows that a deed absolute may have been intended as a mortgage and,

> "So knowing every person ought to be held to be affected with *notice of every right less than absolute ownership the person under a deed so recorded has.* If the record shows an absolute conveyance, it gives notice of the fact that the vendor has parted with all interest he had in the land; and such notice ought to be binding on a subsequent purchaser or mortgagor, who must know that, as between the parties, on proof of the fact it was executed to secure a debt, the courts will hold it to be only a mortgage" (italics ours).

While not as cogent as decisions from Texas, it is noteworthy that the California cases reach the same conclusion on like reasoning.

> "The fact that an instrument purporting to be an absolute grant is subject to a defeasance, or may be shown to be a mortgage, does not authorize it to be recorded among mortgages. Only such instruments as are mortgages by their terms are to be so recorded."
>
> *Kent v. Williams, supra.*

Since appellee's proposition III (Supplemental Brief) is false as an independent proposition, no ex-

tended comment on propositions I and II (Supplemental Brief) will be made. Lest they be deemed conceded, appellants have analyzed the cases cited thereunder in the appendix, *infra*.

Conclusion.

While the intention of the parties is not alone to be gathered from the terms of the deed, there is nothing in the declaration of trust to indicate that the parties intended to vest any interest in the so-called beneficiary. On the contrary he and his assignees stipulated that Trust Company should have complete ownership, that they should have none. The right of possession given by the declaration of trust to the beneficiary was not the possession of an owner but a mere license to enter for the limited purpose of installing street improvements and showing lots to prospective purchasers,—

> "HOWEVER, said Beneficiary shall have only such possession of the real property covered hereby as may be necessary in the subdivision or improvement of the property as aforesaid, or in the fulfillment of any of the obligations of said Beneficiary under this Trust;" (Tr. 427).

Record ownership, as intended by the parties, at all times was and still is in Trust Company. No creditor of the bankrupt or of its predecessors was misled by omission to record the declaration of trust. Recorded, it would merely confirm what was already a matter of record,—Trust Company's ownership.

The finding that Barringer and Trust Company held the bankrupt and its predecessors out as owners was based on no evidence whatever. Over appellants' objection Grose, who in writing agreed to purchase from Trust Company, was permitted to swear he believed he was buying from Owens (although his sworn answer was to the contrary, Tr. 224, 227-228). A sign painter over like objection swore he painted signs for Owens simply because Owens told him he was owner. There was no showing that Trust Company or Barringer authorized or even suspected that Owens made this false statement.

It is submitted that this Court should reverse the order below and dispose of the matter conformably with the provisions of the declaration of trust, either ordering the premises sold to satisfy all sums due Barringer, costs and attorney's fees or, in the alternative, commanding the bankrupt's trustee to surrender all claim to the property.

Dated, San Francisco, California,
December 15, 1937.

Respectfully submitted,
WM. H. MACKAY,
Solicitor for Margaret B. Barringer and Phoenix Title and Trust Company.

ELLINWOOD & ROSS,
KIBBEY, BENNETT, GUST,
SMITH & ROSENFELD,
Of Counsel.

Appendix

Decisions cited by appellees involving simple trust deeds given by owner to secure debt and for no other purpose.

In *Sacramento Bank v. Alcorn* (1898) 121 Cal. 379, 53 Pac. 813 and in *Wilson v. McLaughlin* (1937) 89 Cal. App. 485, 67 Pac. (2nd) 710, it was held that a simple trust deed while passing title for the limited purpose of securing a debt does not confer beneficial ownership on the grantee. In *More v. Calkins* (1890) 85 Cal. 177, 24 Pac. 729, it was held that a sale by the grantee was to be scrutinized and, on slight showing of unfair dealing, enjoined.

Decisions cited by appellees involving conveyance by owner to third party to secure debt.

In *Younger v. Moore* (1907) 155 Cal. 767, 771, 103 Pac. 221, 223, Moore conveyed to Hihn Co. to secure her debt to Younger, with power in the grantee to manage, sell, exchange or partition the premises. The conveyance was held *not* to be a mortgage, even passing the grantor's after-acquired title. The statement at page 8 of appellee's supplemental brief is incorrect. The Court declared:

> "There is no escape from the conclusion that the deed of Helen M. Moore to the F. A. Hihn Company 'was intended to be * * * a trust-deed', as found by the trial court, and was not intended as a mortgage."

Decisions cited by appellees involving subdivision trusts.

These, reasonably, hold that the effect of a deed is not to be determined from its recitals alone, but must be viewed in the light of a contemporaneously executed trust agreement. Most of them involve a

discussion, not relevant here, of the validity of such trusts under the California statutes, with the observation that the security feature could be upheld as an equitable mortgage if the trust were void under such statutes.

In none of them was it held that title vested in the so-called beneficiary. Thus, in *San Diego Construction Co. v. Mannix* (1917) 174 Cal. 548, 559, 166 Pac. 325, 330, the Court recognized that title was completely in the subdivision-trustee. There, from the terms of the trust the Court found that the so-called beneficiary was given the *unconditional* right to receive conveyances of lots on payment to the trustee of $450 per lot (a provision not contained in Barringer's Exhibit No. 2). Plaintiff paid the trustee this amount and the trustee, keeping the money and applying it to an unpaid installment note, sold these lots under a subsequent default. It sued for the money paid and received judgment. This confirmed the trustee's title, for if it had title subject to a mere lien payment would have extinguished the lien.

Withers v. Bousefield (1919) 42 Cal. App. 304, 312, 183 Pac. 855, 859, involved the liability of a guarantor of notes given under a subdivision-trust. The Court was not concerned with any question of title or beneficial ownership. While, as appears from the quotation at page 6 of appellee's supplemental brief, the complex instrument was likened to a deed of trust to secure a debt, this statement obviously was made to simplify the issues. For, the Court proceeded to hold that the trustee held title under an *active* trust, an arrangement incompatible with the notion of a mere lien. The Court held:

> "Appellants urge a further objection that the trust in the present case is but a dry and passive trust. They are mistaken. The agreement declares that it is intended to secure, and shall secure, the payment by the purchaser to the seller of his selling price of the property, with interest, and all other moneys which may become due or payable under the contract. The trustees are given various active duties to perform in the execution of the trust. These are: (reciting duties similar to those of Trust Company under Barringer's Exhibit No. 2)."

Earl v. Sunnyside Land Co. (1907) 150 Cal. 214, 88 Pac. 920, involved a subdivision scheme wherein the promoter was not *personally* liable in any amount. It was agreed that the note given by the Land Company should be payable only from proceeds from sales of lots by Trust Company at certain minimum prices. Trust Company advanced moneys to pay off an outstanding mortgage lien and its assignee foreclosed the lien for such advance. Land Company objected to recovery on the ground that the advance was payable only from sales engineered by it. The Court found that Land Company had not been promoting sales with diligence and fairness and on that theory, as well as others, construed the trust agreement as giving the trustee an independent lien for advances.

In *Earl v. Sunnyside Land Co., supra,* Land Company attacked the trust as void under California statutes relating to trusts. The Court's remark,—that if void thereunder it was good as an equitable mortgage,—was made with respect to the trustee's lien for advances. EL-1 EL-2 (EL 5)